No. 97-1235

In The
Supreme Court of the United States
October Term, 1997

CITY OF MONTEREY,
Petitioner,

vs.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF
California Association of Realtors®, International Council of Shopping Centers, National Association of Realtors®, National Cattlemen's Beef Association, California Business Properties Association AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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July 31, 1998

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QUESTIONS PRESENTED

1. Does the "rough proportionality" standard for evaluating regulatory taking cases, announced by this Court in *Dolan v. City of Tigard*, apply to land use restrictions which are the functional equivalent of exactions, as well as to exactions themselves?

2. Should this Court abandon the *ad hoc* factual inquiry in taking cases, overruling every regulatory taking case since *Penn Central Transp. Co. v. City of New York*, thus eliminating the role of the jury or judge as trier of fact?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief is support of Respondents.[1]

INDENTITIES AND INTERESTS OF *AMICI CURIAE*

California Association of Realtors® (C.A.R.) is a voluntary trade association representing the interests of approximately 90,000 persons licensed as real estate brokers and salespersons by the State of California. C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. C.A.R. pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as *amicus curiae* in relevant court cases.

California Business Properties Association is a non-profit organization which currently represents the largest commercial industrial real estate consortium in California with about 5,000 members. Its membership includes real

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their

estate developers, builders, lenders, commercial property owners, real estate brokers, major retailers and professional service corporations, including the California chapters of the National Association of Industrial and Office Projects, the Associated Builders and Contractors of California, the Society of Industrial and Office Realtors, Commercial Real Estate Women, the Institute of Real Estate Management and the Commercial Industrial Development Association.

International Council of Shopping Centers, Inc. is the trade association for the shopping center industry. It has over 38,000 members worldwide, over 33,500 in the United States including approximately 6,000 members in the State of California. These members include developers, owners, lenders, retailers, and all others having a professional interest in the shopping center industry. These individuals own or operate virtually all of the 43,000 shopping centers in the United States and 6,000 centers in the State of California. In 1997, these centers accounted for $1,019.3 billion in retail sales nationally representing 53% of total retail non-automotive sales, and $111.3 billion in sales in the State of California, representing 51% of total non-automotive retail sales. These centers employed over 10 million people

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members or counsel) contributed financially to the preparation of this brief.

nationally and over one million in the State of California, representing in both cases about 8% of non-farm employees.

National Association of Realtors® (NAR) is a non-profit professional association incorporated in Illinois. NAR's membership includes 700,000 individuals involved in all aspects of the real estate profession, including brokerage, management, appraisal, and counseling. Members are engaged in the development and sale of residential, commercial and industrial real estate, including activities that are subject to the regulation challenged in this litigation. NAR is also a champion of the rights of real property owners. Through its participation in court cases before this Court and in others as well, NAR has long sought to preserve for property owners the rights guaranteed to them by the Fifth Amendment to the Constitution.

National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farmers and ranchers. NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry. NCBA works to achieve the vision of "[a] dynamic and profitable beef industry, which concentrates resources around a unified plan, consistently meets consumer needs and increases demand." The NCBA Dues Division oversees policy-making, governmental affairs and related activities. In this

role, NCBA is a trade association with about 40,000 individual members, 46 state cattle associations and 27 national breed organizations. Together these organizations represent more than 230,000 cattle breeders, producers, and feeders. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

STATEMENT OF THE CASE

This action arises out of Petitioner's denial of permission to develop a 37.6-acre oceanfront parcel located within the City of Monterey, California. Respondent filed an action under 42 U.S.C. § 1983, asserting (among other claims) that Petitioner, acting under color of state law, had denied to Respondent the right to just compensation for private property that is taken for public use. The regulatory taking claim was tried to a jury, which determined that Respondent had proved by a preponderance of the evidence that the City's action either did not substantially advance a legitimate governmental interest, or that it denied to Respondent all economically viable use of the property.

At trial, Respondent presented evidence "establishing that the City progressively denied use of portions of the

Dunes until no part remained available for a use inconsistent with leaving the property in its natural state." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996). The City denied use of the western one-third of the property "because the City wanted to retain that property for public beach use and access," imposed view shed requirements so that the development could not be seen from the public highway but must be located "in the lowest elevated area of the property, also called the 'bowl' area," and, finally, "denied it any use of the bowl area because of the risk of damage to buckwheat plants, the natural habitat of the endangered Smith's Blue Butterfly." *Del Monte Dunes*, 95 F.3d at 1433-34.

Petitioner filed various post-trial motions for New Trial and Judgment Notwithstanding the Verdict, all of which were denied, and this Petition for Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

1. A prohibition of a certain use can transfer an interest in land from private to public ownership as effectively as a deed. From the points of view of both the owner and the public, it matters little whether a conservation easement is conveyed to the city or the land is required to be left in its natural state for the benefit of endangered species,

the coastal environment, or as a public view shed. Since each of these purposes could be accomplished equally by deed or by negative restriction on land use, the constitutional principle of rough proportionality announced by this Court in *Dolan v. City of Tigard,* 512 U.S. 374 (1994), a case of required dedications, applies equally to land use restrictions having the same effect (if not the same legal form) as a dedication. The rule announced in *Dolan* is but a restatement of the fundamental premise underlying the just compensation clause: a single owner should not be required to bear a public burden which, in fairness and justice, should be borne by the public as a whole.

To abandon this standard of reasonableness and justice would be to desert the Fifth Amendment's promise that, where private property is taken for public use, just compensation will be paid.

2. In determining whether a regulatory taking has occurred, the *ad hoc* factual inquiry required by the precedent of this Court may be performed by a jury examining the effects of the particular restrictions upon the specific land at issue. To convert this inquiry into an issue of law, independent of all factual questions, would require this Court to overrule every regulatory taking case since *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), and to adopt a rule that would effectively eliminate judicial

review of individual land use cases. This Court rejected this precise argument in *Nollan v. California Coastal Council,* 483 U.S. 825 (1987), and *Dolan, supra*, and should do so here as well.

3. Although Petitioner claims that continuing to apply the rule, first announced in *Agins v. City of Tiburon*, 447 U.S. 225 (1980), that a landowner who proves by a preponderance of evidence that the city's action has either deprived the property of all economically viable use or that it fails to substantially advance a legitimate government interest will transfer zoning authority to federal courts, no evidence of this doomsday prophesy is presented. Rather, statistics demonstrate that less than 15% of regulatory taking claims filed in federal court ever make it to judgment, and that the majority of the remainder are decided in favor of the city. Accordingly, no reason for overruling *Agins, see supra, Nollan, see supra, Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), and *Dolan, see supra,* appears, and the judgment below should be affirmed.

REASONS FOR NOT GRANTING PETITION

I. THE *DOLAN* "ROUGH PROPORTIONALITY" STANDARD IS THE APPROPRIATE TEST FOR LAND USE RESTRICTIONS AND PERMIT DENIALS,

WHICH CAN TAKE PROPERTY IN THE SAME WAY EXACTIONS DO.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court described a "rough proportionality" standard under which the burden assumed by the landowner would be compared with the impact of the development in determining whether the landowner was being asked to bear a disproportionate burden which, in fairness and justice, should be borne by the public as a whole. Factually, that case involved a requirement that the owner dedicate by deed a portion of her property to public use. Nothing in that opinion, nor in logic, however, limits the rough proportionality principle to cases where an outright conveyance of legal title is required, nor should that opinion be read to permit municipalities to evade the rough proportionality standard by creating restrictions which unconstitutionally deprive the owner of all legitimate use of land but otherwise differ in that they lack the legal formality of a transfer of legal title.

A land use restriction which operates as the functional equivalent of an exaction of part or all of the land is therefore properly evaluated under the *Dolan* "rough proportionality" rule.

A. The "Rough Proportionality" Standard Properly Applies the Fundamental Principle of the Just Compensation Clause: A Property Owner Should Not Be Required to Bear a Disproportionate Burden Which, in Fairness And Justice, Should Be Borne By the Public As a Whole.

The Constitution's just compensation requirement "[is] designed to bar Government from forcing some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). *See also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984) ("The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of 'the advantage of living and doing business in a civilized community,' some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole.")(quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979) quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922)(Brandeis, J., dissenting)).

The *Dolan* "rough proportionality" standard balances the legitimate community interest in land use planning with the constitutional right of the landowner to avoid bearing a disproportionate share of public needs and requirements.

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan, 512 U.S. at 391.

The *Dolan* rule is predicated on the fundamental principle, described in *Lucas*, that the landowner has the constitutional right to make all uses of his property which are included within his title under background principles of property law, such as state law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The state may not arbitrarily prohibit such a "logically antecedent" use unless it can prove that the prohibition "substantially advances a legitimate government interest," *Dolan*, 512 U.S. 374, 385 (1994)(quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), within the police power. In other words, the city bears the burden of identifying the harm which the proposed project is likely to cause, then to tailor its restrictions to address that threatened harm. The restriction, so tailored, will impose upon the landowner a burden which is not disproportionate to the impact of his development, but is roughly proportional to it.

As Professor Siegan points out:

> The problem presented in *Dolan* is a common one under zoning. Municipalities impose regulations and exactions on the use and development of property that are intended to offset the resulting burdens that the public sustains. In all fairness, the owner should only be responsible for remedying those burdens he creates. An excessive restraint or exaction is a confiscation veiled as an exercise of the police power.

Bernard H. Siegan, *Property and Freedom: The Constitution, The Courts, and Land-Use Regulation* 149 (1997).

To ensure that the landowner was not required to bear a disproportionate share of the public burden, the *Dolan* court employed a heightened level of judicial scrutiny to the reasons put forward by the city in justification of the required exactions:

> The Court's decision in *Dolan* properly balances the state's power to regulate land use and an individual's property rights. The decision also may be viewed as increasing the level of judicial scrutiny focused on development exaction schemes. The Court adopted the 'rough proportionality' standard instead of the widely-used 'reasonable relationship' standard because the Court was concerned with the proper level of judicial scrutiny. *Dolan* requires courts to scrutinize the relationship between required exactions and

> the adverse impacts of proposed developments. Such scrutiny is particularly appropriate when the local government has a direct financial interest in the outcome of the decision.

Keith Kraus, *Recent Developments: Dolan v. City of Tigard: Property Owners Win the Battle but May Still Lose the War*, 48 Wash. U. J. Urb. & Contemp. L. 275, 290 (1995).

In short, *Dolan* makes clear that a landowner may be deprived of an otherwise legitimate land use only if the city can justify the deprivation as a remedy for some adverse impact of her project, and can demonstrate that the magnitude of that deprivation is quantitatively proportionate – albeit only "roughly" so – to the magnitude of the impact. Otherwise, the exaction is a confiscation of private property for public use, requiring just compensation.

B. Land Use Restrictions Which Impose a Disproportionate Burden on the Landowner Constitute a Taking Under *Dolan* Whether Imposed by Regulation, Permit Denial, or Exaction.

The underlying premise of so-called regulatory takings jurisprudence is the "essential similarity of regulatory 'takings' and other 'takings'." *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 651 (1981)(Brennan, J., dissenting). That similarity lies not in the transfer of title

to the government, for often the restriction does not transfer title at all. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Rather, it lies in the fact that

> [p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

San Diego Gas, 450 U.S. at 652 (Brennan, J., dissenting).

Lucas v. South Carolina Coastal Council provides a dramatic example of a restriction on land use which imposed a disproportionate burden on the landowner without requiring that he deed the property to the government. *Lucas*, 505 U.S. at 1019 (1992).

As this Court said in *Lucas*, citing with approval portions of Justice Brennan's *San Diego Gas* dissent,

> [A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1018.

A disproportionate restriction on land use, too, may constitute a taking, even where the owner is left with other substantial uses.[2] The touchstone in such analyses is proportionality to the impact of the proposed project, not conveyance of legal title. For

> [t]he many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

[2] The Court in *Dolan* expressly acknowledged that Mrs. Dolan would have been able to derive economic use from her property despite the permit conditions, but nevertheless the Court held that those conditions worked a taking.

Lucas, 505 U.S. at 1018-19.

Thus, it is not essential (as occurred in *Nollan*) that the owner be required to deed away his right to exclude the public in order to effectuate a taking of a private beach; in *Bell v. Town of Wells*, 557 A.2d 168, 176-77 (Me. 1989), the Supreme Court of Maine came to a virtually identical result on the basis of a legislatively-created right to public access. Accordingly, it was the inability of the owner to use its property (on the basis of flood hazard), not a requirement that the flood plain be deeded to the public, that gave rise to the taking in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Appurtenances to land, such as water rights, may be taken without condemnation or conveyance, simply by re-directing the flows of navigable waters. *See, e.g., United States v. Cress*, 243 U.S. 316 (1917) and *Int'l Paper v. United States*, 282 U.S. 399 (1931) (both involving riparian right to undiminished flow) and *Ball v. United States*, 1 Cl. Ct. 180 (1982) (involving diminished ground water flows resulting from excavation). Mineral rights may also be taken by negative restrictions, even though no conveyance of the right is exacted. *See Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952, (1991) (coal), *Florida Rock Indus., Inc. v. United States*, 21

Cl. Ct. 161 (1990) (limestone), *Yuba Natural Resources v. United States*, 10 Cl. Ct. 486 (1986) (gold).

No reason appears why a restriction on the use of land in order to provide endangered species habitat, or a public beach, or to protect the natural coastal environment, should be analyzed differently from an exaction requiring the conveyance of a conservation easement to the government. In both cases the landowner is equally deprived of the beneficial use of the property and the government obtains the benefits flowing from that deprivation (*e.g.*, public access, habitat, or open space in its natural state).[3]

Indeed, the "rough proportionality" standard set forth in *Dolan* can be viewed as merely an elaboration of the basic *Armstrong* principle of balancing the burdens so that one property owner is not required to bear a disproportionate share of the needs of the community. By limiting restrictions

[3] Conversely, there are substantial reasons why the "rough proportionality" test should apply to land use restrictions. Consider, for example, the familiar case of a proposed development which raises the prospect of imposing certain burdens on public facilities, such a increased traffic, a need for larger public school capacity, or other like additional pressures on public infrastructure, which burdens could be mitigated by an appropriately commensurate financial contribution or property dedication by the developer. It would defy all logic and deny justice if the relevant regulatory body could avoid the constitutional requirement of *Dolan* that the contribution or dedication required of the developer be "roughly proportional" to the burdens created by simply rejecting the project outright, with no threat of the latter action being deemed a taking. Yet that would be precisely the opportunity available to

on land use to those reasonably addressing the impacts created by the particular development in question, this Court highlights a fundamental premise of fairness and justice—that private property should not be taken by government without just compensation simply because a public need exists—which lies at the heart of the Fifth Amendment.

II. THE *AD HOC* FACTUAL INQUIRY REQUIRED TO DETERMINE TAKING LIABILITY IS PROPERLY SUBMITTED TO THE JURY.

Petitioner's contention that liability for a regulatory taking of property without just compensation presents an issue of law, to be determined by the court under the highly deferential standard of review, has been repeatedly rejected by this Court in cases such as *Agins*, 447 U.S. 225 (1980), *Nollan*, 483 U.S. 825 (1987), *Lucas*, 505 U.S. 1003 (1992), and reiterated by this Court just four years ago in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Petitioner fails to recognize that the rule in cases involving broad challenges to an entire ordinance ("facial challenges") is distinct from the rule applicable in cases asserting that the concrete application of that ordinance results in an unconstitutional taking of private property without just compensation ("as applied

the regulatory body if, as petitioner and *amici* assert, *Dolan* did not apply to land use restrictions, but only to exactions.

challenges"). Since Petitioner presents no cogent reason why this Court should take the extraordinary step of reversing its holdings in *Agins, Nollan, Lucas,* and *Dolan*, and because such a standard would have extraordinarily dire consequences for property owners, this invitation to overrule those decisions should be rejected.

A. The *Euclid* Deferential Standard of Review Applies Only to Broad Challenges to Legislative Enactments, Not to Fact-Based Adjudicative Applications of Ordinances to Particular Uses of Property.

Where an entire ordinance is challenged on its face, without reference to a specific application of the ordinance to any particular property, this Court has consistently employed a deferential standard of review. In the case which Petitioner claims is controlling here, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), for example, this Court upheld a town's comprehensive zoning ordinance against a facial challenge that it was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395. In so doing the *Euclid* Court was careful to explain the context of its holding:

> [W]here the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in

> process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.

Euclid, 272 U.S. at 395. *See also, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (requirement that fifty percent of subterranean coal remain in place to prevent subsidence not a taking as a matter of law); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)(wetland regulations not a taking as a matter of law); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (regulation of rock quarries not a taking as a matter of law).

The *Euclid* Court distinguished the case before it from a possible future challenge to the specific application of the ordinance to a particular property:

> It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the

> appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

Euclid, 272 U.S. at 395.

The difference between the "facial" and "as applied" standards for analyzing constitutional challenges to land use regulations is illustrated by comparing pairs of cases brought under the same statutes. For example, in *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264 (1981), this Court upheld the Surface Mining Control and Reclamation Act against a facial taking challenge, while in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991), the United States Court of Appeals for the Federal Circuit upheld a money judgment for the taking of particular coal deposits under the same statute. Likewise, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), this Court upheld the wetland regulations of the Clean Water Act against a facial taking challenge, while in *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990) and *Loveladies Harbor v. United States*, 28 F.3d 1171 (1994), the United States Court of Federal Claims imposed liability for an unconstitutional taking under the wetland regulations, following the kind of *ad hoc* factual analysis required in an

"as applied" taking case. As the *Euclid* Court suggested, even though an ordinance or statute may be upheld under the deferential standard, this does not mean that the same deferential standard should be applied when the regulation "comes to be concretely applied to particular premises," *Euclid*, 272 U.S. at 395.[4]

B. The *Dolan* Standard of Heightened Scrutiny Based on an *Ad Hoc* Factual Inquiry Should Not be Replaced with the Deferential Standard Reserved for Facial Challenges.

[4] Indeed, state courts have not felt themselves bound by the "deferential standard of review," even in cases asserting facial challenges to ordinances which fail to substantially advance a governmental purpose. In *Seawall Assoc's v. City of New York*, 74 N.Y.2d 92 (N.Y. 1989), New York struck down a ban on the conversion of single room occupancy (SRO) units, intended to preserve availability of housing for the homeless, on the ground that experience demonstrated that the ban was ineffective. "The heavy exactions imposed by Local Law No. 9 must 'substantially advance' its putative purpose of relieving homelessness. No such showing of this required 'close nexus' has been made. Rather, the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem." *Seawall*, 74 N.Y.2d at 112. See also *Richardson v. City and County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991)(rent control ordinance, invalidated because it actually benefited sublessors, not renters); *Manocherian v. Lennox Hill Hosp.* 84 N.Y.2d 385, 394 (1994) ("The preservation of this Manhattan Upper East Side housing enclave for this privileged entity's benefit, albeit one engaged in a laudable and necessary eleemosynary health service function, cannot masquerade as general welfare legislation."); *Erlich v. City of Culver City*, 12 Cal. 4th 854 (1996)(monetary exaction as a condition of building approval is a taking).

In contrast to the broad, general challenges to entire statutes or ordinances, in cases such as *Euclid* and *Goldblatt*, this Court has "frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)(alterations in original)(quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). Justice Scalia, writing for the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), followed the paradigm for takings analysis set forth by Justice Brennan in *Penn Central*: "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far [for a regulation to go before it will be recognized as a taking], preferring to 'engage in …essentially ad hoc, factual inquiries.'" *Lucas*, 505 U.S. at 1015 (quoting *Penn Central*, 438 U.S. at 124). *See also*, *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *vacated*, and *remanded*, 18 F.3d 1560, 1564 (Fed. Cir. 1994)("One formula that has emerged and has been repeated in several cases requires that the court balance several pragmatic considerations in making its regulatory takings

determination. These considerations include: the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the Government action.").

In this case, Petitioner contends for nothing less than the abandonment of the *ad hoc* factual inquiry in favor of the deferential standard for facial challenges applied in *Euclid*, 272 U.S. 365, 386-87 (1926). To do this, the Court would be required to overrule every taking decision since *Penn Central, supra*, substituting instead a standard for "as applied" challenges to the specific application of regulations to particular property that even the *Euclid* court itself expressly declined to adopt. Under this standard, cases such as the present one would present no issues of fact to be submitted to the jury but only the bare issue of law whether the denial was arbitrary. Conflicting evidence would be ignored, and the Court would be presented only with the facial question in each instance of whether a city could deny development on police power grounds, without reference to the particular facts of the case. Under such a standard, the Court would be left with very little discretion to rule other than in favor of the city in every case. To adopt the standard that petitioner seeks would thus amount to denying property owners the right to essentially *any* meaningful review of local land use decisions at all, and give regulators unbridled

discretion to limit or to eviscerate completely the rights of property owners to use their property in economically productive ways.

Petitioner's argument here was directly rejected by the majority in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), finding voice in the dissent of Justice Brennan:

> Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."[5]

Nollan, 483 U.S. at 835, n.3 (citations omitted).

Again in *Dolan v. City of Tigard*, the town made the same losing argument that the *Euclid* standard for facial challenges should be used. Distinguishing *Euclid v. Ambler*

[5] "At the same time, however, the majority declined to adopt the deferential rational basis test as the standard against which the imposition of the condition was to be tested; instead the opinion concluded that the easement could only be required if it would 'substantially advance' a legitimate governmental interest." Earl M. Maltz, *The Prospects for a*

Realty Co., 272 U.S. 365 (1926), as well as *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)(which Petitioner here also cites), the *Dolan* Court stated: "[T]hey involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition Petitioner's application for a building permit on an individual parcel." *Dolan*, 512 U.S. at 385.

To ensure that lower courts would not be confused about the heightened level of judicial scrutiny applicable in individual adjudicative land use cases, the *Dolan* Court even rejected the phrase "reasonable relationship" employed by most state courts "because the term . . . seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Dolan*, 512 U.S. at 391. Responding to Justice Stevens' dissent from the use of heightened scrutiny, the majority admitted that:

> He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's

Revival of Conservative Activism in Constitutional Jurisprudence, 24 Ga. L. Rev. 629, 664-65 (1990).

> application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.[6]

Dolan, 512 U.S. at 391 (citations omitted).

Moreover, Petitioner's cry that the *Nollan/Dolan* standard will result in the federal courts becoming substitute city councils in zoning matters is simply unsupported. First, in the eleven years since this Court's decision in *Nollan* established that the city carries the burden of proving that the restriction substantially advances a legitimate government purpose, no such excessive federal court involvement has resulted. Second, one good reason for limited federal court involvement in local land use matters is the stringent ripeness requirement under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), requiring multiple development and permit applications to ensure concreteness, and further requiring in most cases that the landowner pursue his state court inverse condemnation remedy before filing in federal court. *See, e.g., Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994); *Bensch v. Metro. Dade County*, 952 F. Supp 790 (1996). Third, the burden

[6] "These opinions involve a significantly heightened judicial scrutiny and, as was true in *Lucas*, even the suggestion that legislative findings deserve virtually no presumption of validity." Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. Envtl. Aff. L. Rev. 301, 391 (1996).

imposed on the landowner of proving that the restriction denies him all economically viable use or fails to advance substantially a legitimate governmental purpose is significant. The plain fact remains that, in the vast majority of cases, the city's land use decision is upheld against federal court challenge under the *Nollan/Dollan* standard.[7]

Finally, although Petitioner claims some special status for land use regulation under the Constitution (Pet. Br. 20), no reasons in the Constitution or case law support this bold assertion. The plain fact is that land use regulation, like other municipal actions, is exercised subject to the limitations imposed by the Bill of Rights—including the Just Compensation Clause. Where application of a land use ordinance violates constitutional protections, it will be struck down—whether the violation found is of the right to free assembly (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)), the right to equal protection (*Arlington Heights v.*

[7] "The lower federal courts are overwhelmingly predisposed to dismiss federal land use cases on jurisdictional grounds, such as abstention and ripeness. In the context of H.R. 1534, my law firm prepared a survey showing that over 80% of the takings cases originating in the U.S. district courts between 1990-97, were dismissed before the merits were ever reached. For those property owners who could afford an appeal, the survey showed that more than half of the takings claims were still dismissed. Of those appellate cases in the survey that were found ripe, 60% were remanded for more litigation on the merits." *Citizens Access to Justice Act of 1997: Hearings Before the Judiciary Committee of the United States Senate*, 106th Cong. (Oct. 7, 1997)(testimony of Prof. John

Metro. Housing Dev. Corp., 429 U.S. 252 (1977)), or the right to just compensation. As Justice Holmes pointed out more than seventy-five years ago, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

For all of these reasons, *amici curiae* urges this Court to affirm the decision below.

Respectfully submitted,

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July 31, 1998

J. Delaney)(referring to a survey of takings decisions between 1990-97 completed by Linowes and Blocher LLP in Silver Spring, MD).